

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Improving Public Safety)	
Communications in the)	
800 MHz Band)	WT Docket No. 02-55
)	
Consolidating the 900 MHz)	
Industrial/Land Transportation)	
and Business Pool Channels)	
)	
Wireless Telecommunications Bureau)	
Seeks Comment on “Supplemental)	DA 03-19
Comments of the Consensus Parties”)	
Filed in the 800 MHz Public Safety)	
Interference Proceeding)	

TO: The Commission

COMMENTS OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

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EXECUTIVE SUMMARY

As the licensee of an 800 MHz iDEN system supporting vital utility operations, Consolidated Edison Company of New York (“Con Edison”) has a profound interest in the FCC’s efforts to resolve interference in the 800 MHz band. The so-called “Consensus Plan” is not an acceptable approach to this problem, however, particularly in its latest incarnation. On its face, the Consensus Plan would seriously undermine the integrity of existing, rule-compliant systems. The Consensus Parties seek to impose new and, in many cases, unattainable conditions on licensees’ right to be protected from interference, with even more arduous requirements in the proposed Guard Band. If the FCC were to adopt these measures, it would effectively issue Nextel a license to interfere with users such as Con Edison. This would be a step backwards from the current situation in which Nextel at least has an obligation to avoid causing interference. Con Edison is forced to allocate significant time and resources to the resolution of Nextel-caused interference to its system now. The interference environment created under the Consensus Plan could cripple Con Edison’s telecommunications activities.

Furthermore, the proposed framework for implementing the Consensus Plan is grossly unfair and unlawful. The proposed Relocation Coordination Committee, essentially an extension of the Consensus Parties themselves, would wield non-delegable FCC powers in its control of the relocation process. The danger of entrusting this group with virtually unchecked authority over the private land mobile community can be seen in such measures as the proposed licensing freezes and the highly compressed timeframes proposed for relocation. Establishing an across-the-board requirement that licensees relocate from the General Category demonstrates a virtually complete disregard for the sensitive and complex operations carried out by companies, such as Con Edison.

Also significant is the proposed disclosure of information by relocating licensees. The Consensus Parties seek a wholly invasive disclosure, the scope of which is unrivaled in comparable relocations in the past, all of which were remarkably free of controversy. The desire for uniform disclosure of non-public information raises significant issues of national security and the FCC should not entertain this possibility.

The proposed restriction on cellular operations below 861 MHz should not be adopted. This is yet a further instance in which Nextel is seeking to impact other licensees with problems Nextel is causing. The record does not support the notion that cellular architecture *per se* causes interference. Instead, there seems to be general agreement that *Nextel's use of its cellular architecture* causes interference. Elements of Con Edison's system would likely meet the Consensus Parties' proffered definition of "cellular" and yet Con Edison has had no complaints of interference associated with its system. Nonetheless, the Consensus Plan would likely require Con Edison to justify its use of this advanced technology and restrict its ability to use this architecture in the future.

Finally, based on the extensive costs associated with Con Edison's system alone, and the number of licensees that have been identified as needing to relocate, there is a real question as to the adequacy of the proposed relocation funding. The depletion of funding for Business and I/LT licensees, upon which later NPSPAC relocation is dependent, would shut-down the entire relocation process. If this occurs, which is a significant possibility as long as Nextel's funding obligation is capped, NPSPAC operations could be divided between their current allocation and the General Category. Probably worse, NPSPAC licensees could find themselves co-channel with Nextel's cellular operations at the border of relocated NPSPAC regions. This substantial deterioration of the current situation would have no consequences for Nextel, given the fact that

Nextel has capped its funding pledge and that Nextel's right to the requested 1.9 GHz spectrum is secured only by the pledged amount. Having met its end of the bargain, Nextel would be free to enjoy the use of its contiguous 800 MHz spectrum in the top national markets (the first to receive funding) and its 1.9 GHz spectrum nationwide.

The Commission should not even consider relocating licensees unless the Commission is certain that the realignment process will be completed. Otherwise, the Commission will merely exacerbate this situation by disrupting licensees' operations instead of resolving the interference problems for all licensees.

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COMMENTS OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Consolidated Edison Company of New York, Inc., by and through its undersigned telecommunications counsel, hereby files these comments in the above referenced proceeding in response to the Wireless Telecommunications Bureau’s Public Notice¹ requesting comments on the supplemental comments² filed by the proponents of the Consensus Plan.³

¹ *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on “Supplemental Comments of the Consensus Parties” Filed in the 800 MHz Public Safety Interference Proceeding, DA 03-19 (January 3, 2003) (*Supplemental Comment Public Notice*).

² Supplemental Comments of Aeronautical Radio Inc., the American Mobile Telecommunications Association, the American Petroleum Institute, the Association of Public Safety Communications Officials - International, Forest Industries Telecommunications, the Industrial Telecommunications Association, Inc., the International Association of Chiefs of Police, the International Association of Fire Chiefs, the International Municipal Signal Association, the Major Cities Chiefs Association, the Major County Sheriffs Association, the National Sheriffs Association, the National Stone, Sand and Gravel Association, Nextel

I. BACKGROUND

Consolidated Edison Company of New York, Inc. (“Con Edison”) is a public utility that provides electric, gas and steam utility service. Electric service is provided to all of New York City (except a small portion of Queens County) and most of Westchester County. Gas service is provided to Manhattan, the Bronx, part of Queens County and most of Westchester County. Steam service is provided in Manhattan from the Battery at the southern end of Manhattan north to 96th Street. Customers of each of these services combine to total more than 3 million, consisting of 3.1 million electric, 1 million gas and 1.8 million steam customers. Con Edison provides its utility services through more than 120,000 combined underground cable miles and overhead wire miles, 4,000 miles of gas mains, 360,000 gas services and 100 miles of steam mains and services. To help conduct its operations in a safe and efficient manner, Con Edison recently completed construction of a digital iDEN system operating in the 800 MHz band, which is used for its internal communications, including voice communications, short messaging services, and dual NAM capability. To operate the iDEN system, Con Edison has licensed 26 discrete frequencies and has applications for three additional frequencies pending with the FCC in the 800 MHz band and has constructed 23 base stations servicing its 3,300 mobile users

Communications, Inc., the Personal Communications Industry Association, and the Taxicab, Limousine and Paratransit Association, WT Docket No. 02-55 (December 24, 2002) (“*Supplemental Comments*”).

³ As the Wireless Telecommunications Bureau notes, the Consensus Plan’s use of the word “consensus” in the name of the plan “merely denotes that the signatories [to the plan] have reached consensus on the contents of their filing” and does not indicate that all participants in this proceeding support the Consensus Plan. *Supplemental Comment Public Notice* at 1 n. 3. For consistency and simplicity only, Con Edison will also refer to this proposal as the Consensus Plan and the proponents of the Consensus Plan as the Consensus Parties.

throughout its 660 square mile service territory.⁴ Con Edison has invested more than \$25 million in its iDEN system.

The iDEN system allows Con Edison's field crews to respond to and investigate any system problems that occur in a safe and efficient fashion. After determining the scope of the problem, workers relay this information to control centers so that the appropriate action can be taken, such as the immediate dispatch of additional crews and equipment to the site. Without its communications system, Con Edison's ability to conduct its utility operations would be severely impaired. Con Edison workers perform work that is critical to the well being of New York City's residents, government and businesses. Con Edison dispatches 8,000 workers into the field each day to perform work that can be dangerous to employees and the public if communications are impeded. These workers rely on radio communications to perform their critical work and to do it safely.

The importance of an effective communication system was never clearer than on September 11, 2001 when Con Edison had to respond immediately to the events at the World Trade Center that caused severe damage to its electric, gas and steam facilities in Lower Manhattan. Although Con Edison lost numerous public carrier T1 and T3 circuits, Con Edison's private communications system was largely unaffected. As a result, Con Edison was able to maintain critical field communications that allowed it to assess the damage, act quickly to limit the scope of service outages, and develop and implement a plan to restore service as quickly as possible. The mobile system, however, was strained to its limits because many Con Edison personnel who normally use cell phones had to use Con Edison's private network because they were unable to get service on their cellular networks.

⁴ One reason that 23 base stations are needed is that the terrain in Con Edison's service territory

More recently, Con Edison has implemented an iDEN system and concurrently began to experience interference to its operation. Con Edison has documented instances of such interference at approximately 30 locations and expects to discover more locations during its ongoing drive testing activity. These situations are caused mainly by nearby low-site Nextel base stations operating on frequencies that are within several channels of the affected Con Edison frequencies in the 800 MHz band.

Con Edison and other energy utilities have a strong interest in this proceeding because they provide the core resources that permit modern society to function. The lives of virtually everyone within Con Edison's service territory are affected by its utility operations. Without utility services, operations vital to a functioning modern society simply cannot be performed. Con Edison must also ensure the safety of its crews working on Con Edison's infrastructure while still delivering electricity, gas and steam safely and efficiently to its customers. Working with high-voltage electricity and high-pressure gas and steam underground systems is hazardous. A misstep can be extremely dangerous to utility personnel and deprive large areas and populations of vital utility service. To accomplish its mission, Con Edison depends on reliable, seamless land mobile communications, which was the impetus for deploying the advanced digital technology that its iDEN system provides. However, if adopted, the Consensus Plan, would affect the reliability and effectiveness of Con Edison's iDEN system and could compromise its operations.

ranges from densely populated metropolitan areas to undulating, wooded suburban areas.

II. THE CONSENSUS PLAN IS NOT AN APPROPRIATE SOLUTION TO RESOLVE THE INTERFERENCE PROBLEMS

A. The Commission Should Prohibit All Licensees From Causing Harmful Interference

The primary purpose of this proceeding is to resolve the interference problems in the 800 MHz band and the Commission must ensure that *all* licensees are protected from the burdens of interference. The Consensus Plan, however, merely shifts who is subject to interference and, by imposing technical conditions on the right to be free from interference, would probably increase the overall incidence of interference. Instead of adopting the Consensus Plan, the Commission should adopt a solution that promotes the use of technical solutions so licensees will have flexibility to resolve their individual interference problems in a demonstrably efficient and effective manner.

1. Licensees Should Have An Unconditional Right To Be Free From Interference

Under the Consensus Plan, licensees operating in the 854-859 MHz band would be protected from interference only if they use receivers that meet the TIA Class A specifications and only in areas where they receive a signal strength of at least -98 dBm.⁵ These conditions could eliminate Con Edison's interference protection entirely and, at a minimum, would significantly reduce the amount of interference protection to which it is currently entitled.

Con Edison may not be provided with any interference protection at all under the Consensus Plan because it is not clear whether iDEN receivers can be compliant with the TIA

⁵ This assumes that the licensee is operating an "existing system" under the Consensus Plan. *Supplemental Comments* at Appendix F-2.

Class A standard. The TIA Class A standard as defined in ANSI/TIA-102.CAAB-A-2002 is a performance benchmark for the Project 25 air interface. The TIA standard itself is not applicable to Con Edison's system because the channel access method and modulation technique used in the iDEN system are significantly different than those of the P-25 system and there is no published equivalent standards for iDEN systems. Con Edison is concerned that the lack of a corresponding performance standard for an iDEN system in the Consensus Plan could potentially disqualify its system for any interference protection in the 854-859 MHz band.⁶ Moreover, if Con Edison were required to replace its receivers in order to comply with the TIA Class A Standard so that it would be protected from interference, Con Edison estimates that procuring, programming, and distributing 3,300 TIA Class A mobile and portable receivers for its iDEN system would cost upwards of \$6.6 million. As such a cost would be incurred in an effort to retain at least some of the interference protection to which Con Edison is entitled, it should be fully reimbursed by Nextel as part of any approved plan.

Even if Con Edison were to replace all its receivers to meet this standard, Con Edison would still not be fully protected from interference. Con Edison estimates that the signal strength in approximately 6% of its service territory would not meet the proposed -98dBm standard and, thus, the operation of its iDEN system in these areas would not be protected from interference. Measured against the more exacting standards proposed to be applicable to new or replacement systems, Con Edison estimates that the operation of its iDEN system in approximately 10% of its service area would not be eligible for interference protection. To satisfy the proposed signal strength conditions and thus be fully protected from interference, Con Edison would need to build additional base stations to increase the strength of the received

⁶ Con Edison is unaware of any TIA Class A specifications that apply to an iDEN system.

signal. This solution, however, would be impossible in most instances because Con Edison is already operating at the maximum available power to optimize the balance between handoff performance and interference reduction. If it were possible to meet the standard, it would be expensive and difficult to implement because of the difficulty in acquiring the necessary local zoning permits in the New York metropolitan area. As a result, Con Edison would probably lose interference protection in significant portions of New York City.

The Consensus Plan employs backwards logic to place the onus on the victims of interference to justify a right to protection. The Commission should not accept such a patently unfair proposal. Nextel should retain its current obligation to avoid and remedy interference to other licensees. If the Commission changes the interference protection standards as proposed in the Consensus Plan - and Con Edison does *not* support such an approach - licensees that must modify their systems to meet these new requirements should have all of their costs reimbursed by Nextel.

2. The Commission Should Provide Licensees With Flexibility To Resolve Their Interference Problems

The comments in this proceeding demonstrate that there are a variety of causes and solutions to the interference problems. For example, as some commenters pointed out, Nextel's hybrid combiners cause interference because they do not "provide any attenuation of transmitter sideband noise and spurious products, and can cause an elevated noise floor in the vicinity of the Nextel station."⁷ Nextel, however, could use a different type of combiner to alleviate this

⁷ Comments of Department of Information Technology, Fairfax County, Virginia, WT Docket No. 02-55 at ¶ 14 (May 6, 2002).

interference.⁸ In addition, the lack of selectivity by Public Safety receivers can result in interference. The City of Portland, however, was able to modify its receivers in order to improve their performance.⁹

These are just two examples of how licensees were able to resolve their interference problems without rebanding. There are numerous other technical solutions that can be implemented to resolve interference problems, many of which are discussed in the *Best Practices Guide* and Motorola's "Interference Technical Appendix (Issue 1.41)."¹⁰ No single solution is appropriate in every case because each problem is different. Con Edison agrees that the Commission must strengthen its rules to *obligate* parties that are causing interference to correct it. Numerous parties have proposed improved Best Practices.¹¹ The Commission should codify those suggestions that, upon review, provide the best procedures for rapidly addressing interference problems as they arise. By providing parties with flexibility to resolve their interference problems, the parties can address the problems in the most efficient manner. Furthermore, Con Edison believes that, as licensees begin to address the interference problems through technical solutions, they will develop new and even more effective ways to address interference.

⁸ Comments of Delmarva Power & Light Company and Atlantic City Electric Company, WT Docket No. 02-55 at 14-15 (May 6, 2002).

⁹ Comments of City of Portland, Oregon, WT Docket No. 02-55 at 5 (May 6, 2002).

¹⁰ Avoiding Interference Between Public Safety Wireless Communications Systems and Commercial Wireless Communications Systems at 800 MHz - A Best Practices Guide (Dec. 2000); available at <http://www.apco911.org/frequency/downloads/BPG.pdf>, (last viewed Feb. 10, 2003); Motorola, Interference Technical Appendix to the Best Practices Guide (Issue 1.41, Feb. 2002) available at http://www.motorola.com/cgiss/docs/Interference_Technical_Appendix.pdf, (last viewed Feb. 10, 2003);

¹¹ See e.g. Reply Comments of Motient Communications Inc., WT Docket No. 02-55 at 1 (August 7, 2002).

B. Business And I/LT Licensees Should Not Be Placed In A Guard Band

In the event that the Commission does determine to realign the 800 MHz band to resolve the interference problems, it should *not* establish the 859-861 MHz band as a Guard Band because this will subject Con Edison to severe interference that could preclude them from effectively using its communications system. Instead, the Guard Band should be located in the 861-863 MHz spectrum allocated to Nextel.¹²

1. Business and I/LT Licensees Will Be Subject To Prohibitive Interference In The Guard Band

One third of the frequencies utilized by Con Edison for its iDEN system would be in the Guard Band under the Consensus Plan proposal. The *Supplemental Comments* provide that interference protection for licensees in the Guard Band would be similar to the protection afforded to licensees in the 854-859 band, except that the signal strength in the Guard Band must be even more robust. The signal strength criteria that must be satisfied to qualify for interference protection start at -98 dBm at 859 MHz and increase linearly to -92 dBm at 859.5 MHz and then to -59 dBm at 860.5 through 861 MHz.¹³ The signal strength of Con Edison's frequencies in the Guard Band would not be sufficiently strong to qualify Con Edison for protection from interference.¹⁴ For example, Con Edison has licensed several frequencies above 859.5 and,

¹² This is consistent with the approach taken in the 700 MHz band where a Guard band was designated in the commercial portion of the band and licensees in that portion of the band were required to protect non-commercial operations in adjacent bands.

¹³ This assumes that the licensee is operating an "existing" system. *Supplemental Comments* at 41-42; Appendix F-2 - F-3.

¹⁴ Even if Con Edison could relocate all of its frequencies to the 854-859 MHz band it would still not be fully protected because its signal would not be sufficiently strong. In the 854-859 MHz band, approximately 6% of Con Edison's service territory would not be protected from interference.

because these sites could not meet the -92 linear scale to -59 dBm signal strength requirement, more than 15% of the service area associated with these frequencies would not be protected from interference. If Con Edison's General Category frequencies are relocated above 860.5 MHz, 89% of its service contour for these frequencies *will not be protected* from interference because of the -59 dBm signal strength requirement. Currently, Con Edison has licensed three sites using frequencies above 860.3 MHz and Con Edison estimates that approximately 80% of the associated service territory at these sites will not be protected from interference under the Consensus Plan's proposal. To qualify for the same amount of interference protection as it now has under the existing FCC rules, Con Edison would need to build additional base stations. This could be practically impossible or, at a minimum, extremely onerous and expensive because of the zoning and other site acquisition issues in the New York metropolitan area. Accordingly, Con Edison's operations on the newly designated Guard Band frequencies will have insufficient interference protection under the Consensus Parties' proposal. This is unacceptable for Con Edison because its operational responsibilities are critical to the region it serves.¹⁵

2. The Guard Band Should Be Located In The 861-863 MHz Band

If a Guard Band is necessary to protect licensees from interference from Nextel's operations above 861 MHz, it should be located in the cellular allocation in the 861-863 MHz band. This is a more appropriate solution because Nextel's communications are "far more disruptive to public safety operations than are cellular operations and, indeed, constitute the

¹⁵ Con Edison is a Critical Infrastructure Industry because as an energy utility it provides services absolutely vital to keep modern society functioning. *In the Matter of Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, *Notice of Proposed Rule Making*, 17 FCC Rcd 4873, 4894 (2002).

primary cause of disruption to public safety services.”¹⁶ As the cause of the interference problem, Nextel should be required to bear any burdens that are necessary to resolve the interference problem. Accordingly, Nextel should be required to alter its operations in the 861-863 MHz band by engaging only in high-site, high power operations on this spectrum. Licensees in the 859-861 MHz band should be entitled to the exact same interference protection as other licensees operating below 861 MHz. Requiring licensees that are complying with the FCC’s regulations and not causing interference to change their operations (which may not even be possible in many cases) to accept a degraded level of reliability is indefensible.

At a minimum, if the Commission decides to locate a Guard Band in the 859-861 MHz band, Critical Infrastructure Industry licensees, such as Con Edison should have the option to relocate from the 859-861 MHz band to the 854-859 MHz band and be reimbursed for the expense of doing so. Although Public Safety licensees are given this right under the Consensus Plan, non-Public Safety licensees are not permitted to relocate out of the Guard Band unless “the nature of its operations would significantly benefit.”¹⁷ Con Edison and other Critical Infrastructure Industry licensees cannot tolerate operational degradation due to interference. If a Guard Band is established as proposed, Con Edison should have the same right as Public Safety licensees to relocate out of any Guard Band.

¹⁶ Comments of AT&T Wireless Services, Inc., WT Docket No. 02-55 at 6 (May 6, 2002).

¹⁷ *Supplemental Comments* at 10 n. 14.

III. THE CONSENSUS PLAN HAS VARIETY OF LEGAL AND POLICY FLAWS

A. The RCC Is Illegal And Bad Policy

As discussed below in greater detail, the Commission cannot lawfully establish the Relocation Coordination Committee (“RCC”) proposed in the Consensus Plan because the Commission is prohibited from delegating its authority in this fashion. Furthermore, even if this legal restriction were not present, it would be fundamentally unfair to permit the proposed Nextel - and Public Safety licensee - controlled RCC to coordinate the realignment of the 800 MHz band.

1. The Commission Is Prohibited From Delegating Its Authority As Is Proposed In The Supplemental Comments

The Consensus Parties have proposed that the RCC should have complete control over the 800 MHz realignment plan implementation. This arrangement, however, violates the Communications Act because the Commission is restricted with respect to whom it can delegate its authority and the type of authority that can be delegated. The Communications Act provides that the Commission can delegate its responsibilities only to “a panel of commissioners, an individual commissioner, an employee board, or an individual employee.”¹⁸ Because the RCC does not meet any of these criteria, it is illegal for the Commission to adopt procedures that delegate its functions to the RCC.

¹⁸ 47 U.S.C. § 155(c)(1). Several other provisions in the Communications Act recognize section 155(c)(1) as the only statutory authority permitting the FCC to delegate its functions. *E.g.*, 47 U.S.C. § 405 (governing petitions for reconsideration of orders, decisions, reports, or actions by any designated authority pursuant to a delegation under section 155(c)(1));

The RCC also does not conform with any other methods by which the Commission is permitted to designate a party to help the Commission carry out its functions. For example, under the Federal Advisory Committee Act, an advisory committee may only act in an advisory role¹⁹ and must have an employee of the federal government as a member.²⁰ Because the RCC would decide and implement policy and lacks a government representative, the RCC does not meet the requirements of the Federal Advisory Committee Act. Similarly, the RCC cannot be established as a corporation under the Commission's authority because the Commission can only establish or acquire a corporation to act on its behalf if its enabling statute specifically authorizes such action, which is not the case here.²¹

2. The RCC Would Not Be Impartial And Would Wield Excessive Power

Even if legally permissible, the RCC should not be created because it is not structured to render a decision in a fair and impartial fashion and the proposal does not clearly establish that the RCC's decisions can be appealed. Under the Consensus Plan, the membership of the RCC would consist of Nextel and four members of the Land Mobile Communications Council, two representing Public Safety licensees and two representing private wireless licensees.²² Each member is supposed to represent the views of its own "constituency." Nextel and the two Public Safety members constitute a majority and will thus collectively control the RCC regardless of the positions taken by the two private wireless representatives.

¹⁹ 5 U.S.C. App. 2 § 2(b)(6).

²⁰ *Id.* at § 10(e).

²¹ 31 U.S.C. § 9102; *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 396 (1995). Letter from Robert P. Murphy, General Counsel, U.S. General Accounting Office, to the Honorable Ted Stevens, United States Senate, B-278820 at 7 (Feb. 10, 1998).

²² *Supplemental Comments* at 15-16.

There is no assurance that each RCC member will not seek to advance its own self interest rather than the public interest. For example, licensees are only required to relocate if there are sufficient funds to pay their relocation costs.²³ However, there is only \$150 million available to relocate non-Public Safety licensees.²⁴ If these funds are insufficient, the relocation process will stop and Business and I/LT licensees will continue to utilize the General Category frequencies, NPSPAC licensees will not be fully relocated from the 866-869 MHz band, and Nextel will not receive all of the spectrum in the 866-869 MHz band. To avoid this result, Nextel and the two Public Safety members have a vested interest in minimizing reimbursement amounts to Business and I/LT licensees so that the \$150 million covers as many licensees in this group as possible. Accordingly, these entities cannot possibly be considered impartial, unbiased parties who can serve as neutral administrators of this process.

Business and I/LT licensees must negotiate with Nextel to determine the amount of reimbursement that each licensee is entitled. If the parties do not reach an agreement, the Consensus Plan provides that the parties will arbitrate their dispute before a panel that is selected by the RCC. Nextel and the two Public Safety members can be expected to empanel arbitrators that favor their point of view and minimize reimbursement to Business and I/LT licensees. If licensees are dissatisfied with the panel's decision regarding their relocation costs and the amount of funding that they should receive, licensees cannot appeal the decision.²⁵

In addition, it is unclear whether or not a court could review the RCC's decisions. Under the Administrative Procedure Act, licensees are entitled to judicial review if they are "adversely

²³ *Id.* at 11-12.

²⁴ *Supplemental Comments* at 5.

²⁵ *Id.* at Appendix C-22.

affected or aggrieved by agency action.”²⁶ Because the status of the RCC is unknown, it is unclear whether or not their decisions will be considered an “agency action.” As a result, the RCC could have complete unchecked control over the relocation process. Given the interests at stake, the Commission cannot endorse such an arrangement.

B. The Commission Should Not Take Any Action That Would Impair Utilities’ Ability to Acquire Spectrum

As part of the realignment process, the Consensus Parties claim that a licensing freeze is necessary in order to facilitate the relocation process²⁷ and to allow Public Safety licensees to acquire new spectrum.²⁸ During the relocation process, Business and I/LT licensees would not generally be able to apply for new licenses or modify their existing licenses.²⁹

The licensing freeze will severely hinder Con Edison’s ability to implement its new iDEN system. Con Edison needs flexibility to optimize its system’s performance, expand its operations, and address interference problems. As discussed above, Con Edison’s iDEN system is designed to provide seamless coverage throughout Con Edison’s service territory. Although Con Edison has constructed the system, extensive ongoing system modifications and refinements are required to effect full coverage and to keep pace with changes in Con Edison’s utility

²⁶ 5 U.S.C. § 702.

²⁷ *Supplemental Comments* at 26.

²⁸ Reply Comments of Aeronautical Radio, Inc., the American Mobile Telecommunications Association, the American Petroleum Institute, the Association of American Railroads, the Association of Public Safety Communications Officials – International, Forest Industries Telecommunications, the Industrial Telecommunications Association, Inc., the International Association of Chiefs of Police, the International Association of Fire Chiefs, the International Municipal Signal Association, the Major Cities Chiefs Association, the Major County Sheriffs Association, the National Sheriffs Association, Nextel Communications, Inc., the Personal Communications Industry Association, and the Taxicab, Limousine and Paratransit Association, WT Docket No. 02-55 at 25 (August 7, 2002) (“*Consensus Parties Reply Comment*”).

²⁹ *Supplemental Comments* at 26.

activities. For example, Con Edison's system vendor recommends co-locating iDEN system stations with interfering transmitters to resolve some interference problems that cannot be addressed by any other means. In order to implement this solution, Con Edison must license additional frequencies, which will require it to modify its service contour. Additionally, Con Edison plans to add data capabilities to its system, which will add vital new functions and increase the efficiency of its dispatch operations. If a freeze is imposed, these types of modifications will not be permitted except through the onerous and uncertain waiver process.

C. The Process For Relocating Licensees Is Flawed

The relocation process that is proposed by the Consensus Parties is severely flawed because: (1) licensees cannot relocate in the six-month period that they are given; (2) the \$850 million will not likely be sufficient to cover all relocation costs, which could halt the relocation process prior to completion and subject Public Safety licensees to an even greater amount of interference; and (3) licensees are required to turn over a voluminous amount of information, posing a security risk.

1. It Is Unrealistic To Expect Licensees Operating Complex Wide-Area Systems To Relocate In Six Months.

Under the Consensus Plan, licensees would be required to relocate in either six or twelve months. The amount of time is based on whether or not the licensee is located in a high or low priority NPSPAC region, which is determined by the NPSPAC region's population and is modified to take into account the amount of interference in the NPSPAC region.³⁰ Because

³⁰ *Id.* at 16.

NPSPAC Region 8, where Con Edison is located, has the largest population of any NPSPAC region, it is almost certain that Con Edison will have only six months to relocate.³¹

Requiring Con Edison to relocate in this period of time is unrealistic because of the complexity of re-engineering an iDEN system covering an area such as New York City. It took Con Edison and its vendors years to design, implement and construct its system. Relocating the system within the accelerated timeframes proposed under the Consensus Plan cannot be accomplished without compromising the system's communications capabilities. Con Edison notes that, if it ever relocated its iDEN system under the Commission's current rules, it would have up to five years.³² The Commission's regulations even provide Con Edison with more time to construct a single station (12 months).³³ Nevertheless, the Consensus Plan proposes to realign the 800 MHz band in as little as six months. Con Edison estimates that it would take approximately one and one-half years to relocate its iDEN system because of the time needed to reprogram and redistribute the associated 3,300 mobile and portable radios. A shorter time frame than this would cause deterioration in system performance because many of the mobile and portable radios would experience excessive delays in order to communicate initially and in handing off calls between cells.

The Consensus Parties themselves acknowledge that it will be difficult to meet deadlines when they propose to allow *Public Safety licensees* an extension if circumstances beyond their immediate control, such as delays in equipment delivery, prevent such licensees from complying

³¹ *Id.* at Appendix E.

³² 47 C.F.R. § 90.629.

³³ *Id.* at § 90.155.

with the time limit.³⁴ Non-Public Safety licensees such as Con Edison, however, would not be given the same flexibility. Certainly, there can be no justification for such disparate treatment.

2. The Consensus Plan Raises Serious Questions About Funding

Nextel has “volunteered” to contribute \$850 million, comprised of \$700 million for Public Safety and \$150 million for non-Public Safety licensees, to cover the “relocation costs of all 800 MHz incumbents required to relocate pursuant to the Consensus Plan.”³⁵ Although Nextel and the Consensus Parties claim that these funds will be sufficient, subsequent statements in the *Supplemental Comments* indicate that this is probably not true. The \$150 million is expected to cover the reasonable costs of retuning and relocating Business, I/LT, and high-site SMR licensees.³⁶ However, all non-Public Safety licensees, such as Southern LINC, are eligible to be reimbursed from the \$150 million fund.³⁷ It does not appear that the Consensus Parties included Southern in these cost estimates because Southern LINC’s network consists of both high and low SMR sites.³⁸

In addition, Con Edison estimates that if the Consensus Plan is implemented, it would cost Con Edison \$4 million to retune the affected base radios, including related site work, and to reprogram the 22 dispatch stations and 3,300 mobile units. This represents 2.67% of the entire relocation fund for the 1,058 non-Public Safety licensees identified by the Consensus Plan as subject to relocation.³⁹ If Con Edison is required to replace its receivers in order to be protected

³⁴ *Supplemental Comments* at 30 n. 50.

³⁵ *Id.* at 5-6.

³⁶ *Id.* at 6.

³⁷ *Id.* at 45.

³⁸ *Id.* at 44.

³⁹ *Id.* at Appendix A-6.

from interference, its relocation cost would increase to \$10.6 million, which represents 7.1% of the non-Public Safety relocation fund.

In addition, the \$700 million may not be sufficient to reimburse Public Safety licensees for their relocation costs because of the uncertainty surrounding the number of mobile radios that will be replaced.⁴⁰ Even slight variations in the percentage of radios that are retuned versus replaced will dramatically affect the relocation costs of Public Safety licensees. As a result, it is unclear if the \$850 million will cover all the relocation costs.

To rectify this problem, the Commission should not cap the relocation costs that can be paid to licensees. Previously, when the Commission has relocated incumbent licensees, incumbent licensees were fully reimbursed without a limit on the amount that could be paid to all the relocated licensees.⁴¹ Similarly, in this instance, licensees in the 800 MHz band should not have another licensee's reimbursement affect their reimbursement. In this instance, it is particularly inappropriate to cap the amount of relocation funds because of the devastating consequences if the relocation process could come to a halt prior to completion. If this occurs, NPSPAC licensees and Nextel will both be operating the 851-854 MHz band and the 866-869 MHz band. As a result, NPSPAC licensees would be subject to interference from Nextel's operations in both bands. Instead of resolving the interference problem, Public Safety licensees will likely be subject to an even greater amount of interference. The Commission must ensure that, if a relocation plan is adopted, it will be completed.

⁴⁰ *Id.* at 6.

⁴¹ *See e.g.* 47 C.F.R. § 101.75.

3. The Information Requested By The RCC Is Overbroad And Unnecessary

In order to carry out the relocation process, the Consensus Plan would require relocating licensees to provide an extraordinary amount of information about their communications systems to the RCC.⁴² There does not even appear to be a logical reason why some of the information is being requested. For example, Business and I/LT licensees are required to disclose their control channel rotation scheme and how their radios are allocated, including to which employees and the number of hours that the radios are used each day.⁴³ There is no reason why the RCC would need all this information when, previously, the FCC has been able to relocate and reimburse licensees without requiring it.

Not only is the information unnecessary, but requiring utilities to divulge this information poses a security risk. In Afghanistan, the United States discovered that terrorists had diagrams of American utility plants.⁴⁴ Congress even recognized that information regarding utilities should not be made publicly available and enacted legislation to ensure that information accumulated about critical infrastructure industries by the Directorate for Information Analysis and InfraStructure Protection could not be disclosed under the Freedom of Information Act, except under certain very limited circumstances.⁴⁵ Conversely, the Commission can make no such guarantees, even if the Commission considers the information confidential.⁴⁶ Accordingly, the

⁴² *Supplemental Comments* at Appendix C-6 to C-6.

⁴³ *Id.* at Appendix C-12.

⁴⁴ David Johnston and James Risen, *Seized Afghan Files Show Intent, Not Plans*, N.Y. Times, Feb. 1, 2002 at A13.

⁴⁵ Homeland Security Act of 2002 at § 214(a)(1); Pub. L. No. 107-296, Title II, 116 Stat. 2135, 2152 (2002); *codified at* 6 U.S.C. § 133(a)(1).

⁴⁶ *Mobil Oil Corp. v. F.T.C.*, 406 F. Supp. 305 (1976).

Commission should not require licensees to provide this information unless the Commission and the RCC can guarantee its confidentiality.

IV. THE COMMISSION NOT SHOULD RESTRICT LICENSEES FROM USING ADVANCED TECHNOLOGIES

The Consensus Parties claim that licensees using a “cellular system architecture” have caused Public Safety’s interference problems. The comments in this proceeding reveal, however, that Nextel’s operation of its cellular architecture, and *not* cellular systems in general, is responsible for interfering with Public Safety operations. Accordingly, the ban on cellular system architecture is unwarranted and inconsistent with the Commission’s policy of promoting advanced technologies.

A. Prohibiting Cellular Operations Is Unnecessary To Protect Public Safety Licensees From Interference

The Consensus Parties claim that it is necessary to separate cellular and non-cellular operations in the 800 MHz band in order to protect Public Safety licensees from interference. The Consensus Parties, however, have not established that this statement is true. Rather, the comments in this proceeding demonstrate that *Nextel* is interfering with Public Safety licensees.⁴⁷ Other companies, such as Southern LINC, use “equipment substantially the same . . . as that used by Nextel without creating the problems that Nextel creates.”⁴⁸

Con Edison also uses an iDEN system that is similar to Nextel’s, and has not received any interference complaints even though its system would probably be considered a cellular system under the Consensus Plan. In this regard, Con Edison’s iDEN system has: (1) more than

⁴⁷ Reply Comments of Cingular Wireless LLC and Alltel Communications, Inc., WT Docket No. 02-55 at 8 (August 7, 2002).

5 overlapping, interactive sites featuring hand-off capability; (2) sites with antenna heights of less than 100 feet above ground level on HAATs of less than 500 feet; and (3) sites with more than 20 paired frequencies.⁴⁹ As a result, Con Edison would probably have to request a waiver to continue to operate its iDEN system, even though it is not interfering with other licensees and is itself subject to interference from other cellular licensees.⁵⁰

The ban on cellular system architecture is particularly troublesome for Con Edison because in some instances Con Edison must deploy low-power, low-site micro-cells to address highly localized areas of poor coverage. In addition, there are some interference problems that cannot be resolved except by co-locating with low site interfering transmitters. If Con Edison were restricted from utilizing a “cellular system architecture,” the effectiveness of its iDEN system would be compromised.

B. The Restriction On Cellular Operations Is Contrary To The Commission’s Deregulatory Approach

A primary principle of the Commission’s spectrum management policies is to “pursue policies that . . . encourage the development of emerging telecommunications technologies” because the Commission recognizes that it is necessary to use the limited amount of spectrum efficiently.⁵¹ In addition, establishing policies that allow innovation is important to spectrum

⁴⁸ Comments of Skitronics, LLC, WT Docket No. 02-55 at 21 (May 6, 2002).

⁴⁹ *Consensus Parties Reply Comment* at 10.

⁵⁰ Con Edison is not certain whether or not its system would be classified as a cellular system because the Consensus Parties have not elaborated further on how the above definition would be implemented.

⁵¹ *In the Matter of Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, FCC 99-354, *Policy Statement*, 14 FCC Rcd 19868, 19868 ¶ 2 (1999).

users because they “need flexibility to respond to market forces and demands.”⁵² In particular, licensees need flexibility to use cellular-like architectures in order to effectively use their communications systems.⁵³

The Commission reaffirmed this policy when it initiated the Spectrum Policy Task Force, which was created, in part, to “establish new ways to support innovation and the efficient, flexible use of spectrum.”⁵⁴ The Task Force recently issued a report on improving the management of the radio spectrum and recommended that the Commission should “avoid rules that restrict spectrum use to particular services or applications.”⁵⁵ Instead, the Commission should adopt more flexible rights models that create opportunities for new, more efficient and beneficial uses.⁵⁶

This recommendation, however, contrasts starkly with the Consensus Plan’s prohibition on cellular operations below 861 MHz. Instead of increasing a licensee’s flexibility, the Consensus Plan seeks to further restrict the conditions under which a licensee must operate its station. The Commission should not “freeze ourselves in time to the detriment of the market, the technology and our citizens” by prohibiting certain operations.⁵⁷

⁵² *In the Matter of Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, FCC 00-401, *Policy Statement*, 15 FCC Rcd 24178, 24181 (2000).

⁵³ Reply Comments of the City of San Diego, WT Docket No. 02-55 at 4 (August 7, 2002).

⁵⁴ *FCC Chairman Michael K. Powell Announces Formation of Spectrum Policy Task Force*, News Release, (June 6, 2002).

⁵⁵ *Spectrum Policy Task Force*, ET Docket No. 02-135, *Report*, at 16 (November 2002).

⁵⁶ *Id.* at 46.

⁵⁷ *FCC Chairman Michael K. Powell Outlines Critical Elements Of Future Spectrum Policy*, News Release, (August 9, 2002).

V. CONCLUSION

In conclusion, the Commission must take steps to reduce interference in the 800 MHz band. The extremely self-serving Consensus Plan, however, is not the answer. This plan will severely burden licensees that are not causing interference, including companies providing vital public services such as Con Edison, and will not adequately address interference, as demonstrated by the iDEN to iDEN interference Con Edison is experiencing. The Commission must, therefore, not accede to either Nextel or the Consensus Parties' ultimatum, but instead, adopt a measured approach that places clear responsibility on the interfering party.

WHEREFORE, THE PREMISES CONSIDERED, Con Edison respectfully requests that the Commission consider these comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: February 10, 2003

CERTIFICATE OF SERVICE

I, Christine S. Bisio, do hereby certify that on this 10th day of February 2003, I caused a copy of the foregoing "Comments of Consolidated Edison Company of New York" to be hand-delivered to each of the following:

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